SUPREME COURT, U.S.
FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-469

WILLIAM B. RICHARDSON,
Petitioner

v.

THE PEOPLE'S NATURAL GAS CO., et AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

WILLIAM B. RICHARDSON, *pro se*
149 Westmoreland Avenue
Greensburg, PA 15601

The Palace Printer, Greensburg, PA 15601

REPLY BRIEF

TABLE OF CONTENTS

PETITIONER'S COMMENT ON GAS COMPANY'S "COUNTER STATEMENT OF THE CASE"

THE STATE LAW: "CHARACTER OF SERVICE AND FACILITIES"

SUPREME COURT'S RULE 17 COMPLIANCE

SOME CASE LAW NOTES

CONCLUSION

AUTHORITIES CITED

STATUTES

Title 42 USC sect. 1985 7
Title 66 Pa. C.S.A. sect. 1501 4

PENNSYLVANIA CODE

Title 52 Pa. Code sect 59.21 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 5(e) and 5(d) 1
Rule 12(b)(6) 3, 5
Rule 56 3

CASES

Annotation to Memphis School Dist. v Stachura, 91 L.Ed2d 647 (1978) 6

Brobst v Columbus Service Int'l, 761 F2d 148 (CA3, 1985) 5

Brown v Bellaplast Machinenbau, 104 F.R.D. 585 (CA3, 1985) 6

Holt Civic Club v Tuscaloosa, 439 US 60 (1978) 7

Memphis Community School Dist. v Stachura, 477 US 299 (1986) 6

Moore v City of Paducah, 790 F2d 557, (CA6, 1986, Ky) 7

Whitner v Davis, 410 F2d 24 (CA9,1969,WA) 6

PETITIONER'S COMMENT ON GAS COMPANY'S "COUNTER STATEMENT OF THE CASE"

The first sentence of the "Counter Statement" at page #1 of the Gas Company's Brief in Opposition to the Petition for Certiorari is not correct. The first communication to the petitioner was a letter stating: "Dear Customer, we're required by the Pennsylvania Public Utility Commission to change all meters periodically. Our servicemen have made several attempts to change your gas meter but found no one home on each occasion. - - - " The foregoing is from the Customer Service Foreman's testimony at the Public Utility Commission (hereinafter PUC) hearing November 5th, 1984. This letter was sent by him. Documented at the same hearing was the untruthfulness of the "several attempts to change" the Gas Meter. (the transcript of the PUC hearing was filed with the District Court at the first session, November 21, 1986. The petitioner has made strenuous effort to get the Court to file this transcript with the official record but to no avail. The same effort applies to two briefs filed with the District Court. The Court refuses to comply with Rules 5(d) and 5(e) of the Rules of Civil Procedure. (See page 8, Petition for Writ of Certiorari).

The petitioner has never seen any statute, rule, or regulation which required the Gas Company to "change all meters periodically." It is remarkable that nothing appears in the Gas Company "Brief in Opposition" to substantiate this alleged requirement. According to the Gas Company attorney (Brooks), speaking for the record (Appendix, A-4, Petition for Writ of Certiorari), a meter must be changed "every 12 to 20 years." **Now he says in his Brief in Opposition to the Petition for Certiorari that on April 24, 1984, when this all started, that all the Gas Company wanted to do was "to test the Gas Meter."** Petitioner got a different story in 1984!

According to the Pennsylvania code (59.21, note 1, bottom page 1, Brief in Opposition), the only requirement is "periodic testing" with replacement only of "Obsolescent meters." There was no testimony at the PUC hearing that petitioner's meter was obsolete or defective. Testing of the meter has been accomplished.

The Gas Company had only one objective in 1984 and that was to get the meter moved to a location it would designate outside the house and to have the cost of relocating the meter borne by the petitioner. This relocation expense is, by law, the obligation of the Gas Company (see page 8, Petition for Certiorari; also, see this Reply Brief heading titled: "THE STATE LAW: CHARACTER OF SERVICE AND FACILITIES")

This is a big thing with the Gas Company. They want their cake and eat it to. The Customer Service section manipulates the customer into position to make the relocation at the customer's expense and this same Customer Service is financed by the customer (bottom page 7, Petition for Certiorari). If he uses no gas during a month, he still pays for the service.

This is a racket! The PUC knows it and it is obvious from this case that an Administrative Law Judge believes it is his duty to cooperate 100% with the Gas Company in its illegal endeavor. In perpetuating this manipulative policy, the Gas Company and PUC defendants committed the constitutional violations set out in the petitioner's complaint (see A-9 thru A-11, Brief in Opposition); primarily, they were committed in course of pleading, hearing, and subsequent administrative appeals; although, the two nonjudicial persons named defendants as PUC employees were implicated by acts prior to petitioner filing for hearing with PUC.

The Gas Company uses the word "apparently" as license to misrepresent the facts in its Brief in Opposition then repeats these misrepresentations as though etched in stone. To reinforce its self-serving presumptions, the Gas Company uses documents that were attached to Motions to Dismiss and never converted to Motions for Summary Judgment in the District Court. In order for these documents (A-2 thru A-8, Brief in Opposition to Petition for Writ of Certiorari) to be presented as evidence in any Court, Rule 12(b) (6) and Rule 56 must be complied with.

A Rule 12(b) (6) Motion to Dismiss with appended documents which purport to be matters outside the pleading, does not automatically become a Motion for Summary Judgment. The Gas Company presupposes otherwise. No where in the transcripts or records of this case have any of these documents been verified or recognized by the District Court as matters outside the pleadings.

At pages 7 & 8 of the Petition for Writ of Certiorari, the petitioner described, in general, the Gas Company's practice in dealing with its customers when it claims a periodic meter change is due. As to the petitioner, he was dealt with by the Gas Company more severely - more dishonestly. It was misrepresentation and threats from the very beginning culminating in what petitioner perceived as perjury during the hearing at the PUC.

The record of this case in the District Court shows that the petitioner-plaintiff did attempt to get prosecutors, including the Attorney General of Pennsylvania, to investigate for criminal liability - but to no avail.

THE STATE LAW: "CHARACTER OF SERVICE AND FACILITIES"

The Pennsylvania statute Title 66 Pa C.S.A. 1501 reads:

"Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. - - - "

At the PUC hearing, the petitioner introduced a letter authorizing the Gas Company to come any time to make any repairs or changes necessary. No formal appointment necessary. The Gas Company has always had access to its meter in petitioner's house.

SUPREME COURT RULE 17 COMPLIANCE

Both the District Court and the Third Circuit Court of Appeals issued sua sponte grants of summary judgment. This is improper treatment of a pro se litigant. It is even worse when the Appeals Court taxes attorney fees and costs to its judgment - and even it is without findings.

Furthermore, the Third Circuit Court of Appeals by defaulting on its obligation to issue findings has overlooked the gross error of the district Court in issuing Dismissal with Prejudice without findings and has aggravated the lower Court's error by assessing attorney's fees and costs against the pro se litigant without findings leaving in limbo an important question of Federal law dealing with sua sponte treatment of the pro se litigant in constitutional and civil rights cases.

There does not seem to be any Supreme Court evaluation on the issue of sua sponte District Court dismissals with prejudice involving pro se plaintiffs.

Pro se plaintiffs are known to be in the never never land of too rich to qualify for legal help and too poor to afford competent help.

"A sua sponte grant of summary judgment should be avoided." **Brobst v Columbus Services Int'l**, 761 F2d 148, 154 (CA3, 1985). (petitioner's note: the foregoing **Brobst** statement applies in general. It would appear that opinion with findings and some explanation would be in order when a pro se plaintiff is dismissed on the merits of his case. This should be especially true when such a plaintiff believes his constitutional rights are involved.)

SOME CASE LAW NOTES

Since there is no Legitimate Rule 12(b) (6) motion in effect before the District Court, the Gas Company cannot exploit any of the alleged defenses set out in its brief in opposition for purposes of dismissal on the merits.

The issue of **EXHAUSTING STATE REMEDIES:** "Although the plaintiff did file an action in the Washington state court, arising out of her dismissal from the college faculty, that action was dismissed and appeal was not prosecuted. The complaint in this case was filed in the federal district court while the state proceedings were pending. At most, however, the pendency of the state action would allow the district court, applying the doctrine

of abstention, to hold the federal suit in abeyance while awaiting the outcome of the state action. It did not entitle the district court to dismiss the action with prejudice for lack of jurisdiction or for failure to state a claim." **Whitner v Davis** 410 F2d 24, 28 (CA9,1969,WA)

Take a look at RES JUDICATA or COLLATERAL ESTOPPEL which the Gas Company claims to be applicable. Even assuming there was a validly converted Motion governed by Rule 56 in effect below and sponsored by the Gas Company, these defenses would not be available because such is not apparent on the face of the complaint: see **Brown v Bellaplast Maschinenbau** 104 F.R.D.585, 587 (CA3, 1985)

Everything in the complaint indicates that the issues before the District Court arose from false testimony under oath, conspiracy, and flagrant abuse of power for which damages are sought. These are issues for which the PUC has no jurisdiction. Even if petitioner had pursued the case on appeal to the Commonwealth Court, the same would be true. At no time has any part of the controversy been heard on its merits in a court of law.

As to DAMAGES: At page 8 of the Brief in Opposition, a paragraph begins "Richardson is apparently contending that, since he is alleging a violation of constitutional rights, he is entitled to a recovery of monetary damages in the event he should prevail in his claim." The statement would be correct, according to the case the Gas Company cited, if the word "apparently" were removed and the word "nominal" substituted for "monetary". The **Memphis Community School Dist. v. Stachura** case held that "nominal" damages **were appropriate** for certain "absolute" rights and the right to procedural due process has been held to be "absolute" because "it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process should be actionable for nominal damages without proof of actual injury." **Annotation to Memphis School Dist v Stachura**, 91 L. Ed.2d 647, 657 quoting from **Carey v Piphus** (1978) 435 US 247.

As to the Gas Company argument about the requirement of CLASS OR RACIALLY BASED DISCRIMINATION, the class is quite obvious. It is the Gas Company customers. The petitioner maintains the class is legitimate under title 42 USC 1985. There are three paragraphs to 1985: 1985(1), 1985(2), and 1985(3). Not all require the conspiracy to be against a class or with racially based discrimination. But even if 1985 should be ruled out altogether, the case law recommends resort to 1983, where applicable and especially if constitutional violations are involved. See **Holt Civic Club v Tuscaloosa**, 439 US 60,65,66 (1978); **Moore v City of Paducah** 790 F2d 557, 559 (CA6, 1986, Ky.);

CONCLUSION

In addition to the QUESTIONS PRESENTED FOR REVIEW (page #1, Petition for a Writ of Certiorari), the Gas Company has now created buffer issues designed to nullify petitioner's argument for review. There is no question but that the Dismissal with Prejudice was entered without proper regard to principles of case law and mandates of the Rules of Civil Procedure. As a result, the petitioner has been deprived of:

a. privileges and immunities accorded Citizens in the several states.
b. procedural due process
c. constitutional rights
d. civil rights

The Petition for Review on Certiorari should be accorded jurisdiction for review.

Respectfully submitted,

William B. Richardson
149 Westmoreland Ave.
Greensburg, PA 15601